SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIRST REPORT

OF

2000

16 February 2000

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIRST REPORT

OF

2000

16 February 2000

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

(a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT OF 2000

The Committee presents its First Report of 2000 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Fisheries Legislation Amendment Act (No. 1) 1999

Migration Legislation Amendment Act (No. 1) 1999
(Previous citation: Migration Legislation Amendment Bill (No. 2) 1998)

Fisheries Legislation Amendment Act (No. 1) 1999

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 14 of 1999*, in which it made various comments. The Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 9 February 2000. A copy of the letter is attached to this report.

Although this bill has now been passed by both Houses (and received Royal Assent on 3 November 1999) the Minister's response may, nevertheless, be of interest to Senators. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 14 of 1999

This bill was introduced into the House of Representatives on 1 September 1999 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the following Acts:

Fisheries Management Act 1991 to introduce new forfeiture and enforcement powers to enable more effective fisheries surveillance and enforcement within the Australian fishing zone; and

Fisheries Management Act 1991 and the *Fisheries Administration Act 1991* to provide for the implementation of principles, rights and obligations associated with the *Agreement for the Implementation of the Provisions of the United Nations Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Stocks*.

Strict liability offences
Schedule 1, items 9, 11, 12 and 14

Items 9, 11, 12 and 14 of Schedule 1 to this bill amend the *Fisheries Management Act 1991*. These amendments explicitly provide that particular offences are offences of strict liability.

It appears that these amendments do no more than confirm the effect of the existing provisions. It appears that they have become necessary because the *Criminal Code*, which is to apply to the *Fisheries Management Act 1991* from next year, would otherwise change these offences to fault-based offences, requiring the prosecution to prove the defendant's state of mind before a conviction could be obtained. However the Explanatory Memorandum does not make this clear. The Committee, therefore, **seeks the Minister's confirmation** that these amendments do no more than continue the effect of the existing provisions, and have been prompted by the application of the *Criminal Code*.

Pending the Minister's confirmation, the Committee draws Senators' attention to these provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Minister

As indicated in the Alert Digest the Bill has two schedules - the first dealing with more effective foreign fishing enforcement, within the Australian fishing zone (AFZ), and the second enabling Australia to ratify the *Agreement for the Implementation of the Provisions of the United Nations Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.* Though this Agreement impacts management of fisheries within the AFZ, it largely concerns regulation of high seas fishing.

Enforcement of fisheries offences requires the use of both strict liability and reversal of onus of proof offences. The Government is committed to effective deterrents being in place for illegal foreign fishing in the AFZ. Most recently, this was confirmed by acceptance of the recommendations in the Report of the Prime Minister's Coastal Surveillance Task Force that comprehensive legislative amendments should be introduced to further strengthen maritime investigatory and enforcement powers.

Many of the offence provisions in the Fisheries legislation are strict liability offences. This type of legislation is necessary because of:

- the difficult practical circumstances with enforcement including collection of proof offshore; and
- the need for strong measures to protect fish resources and the marine environment.

The explicit references to strict liability offences under Schedule 1 of the Bill confirm that the existing relevant provisions under the *Fisheries Management Act 1991* (ie subsections 95(2) and (5); section 99; section 100; and section 101) should continue to be considered as strict liability. This confirmation that these offences are strict liability is consistent with the impending *Criminal Code*.

Reversal of the onus of proof
Proposed new subsections 100A(4) and (5), 101A(4) and (5), 103(1B) and (1E), 105B(3) and (4), 105C(3) and (4), and 105F(3) and (4)

Among the amendments to the *Fisheries Management Act 1991* to be made by this bill are a number of provisions which impose an evidential burden of proof on a defendant to criminal proceedings. For example, proposed new section 100A, to be inserted by item 13 of Schedule 1, creates an offence of using a foreign boat for fishing in the Australian fishing zone. Proposed subsections 100A(4) and (5) provide an exemption for boats having a foreign fishing licence or a Treaty licence. The defendant bears an evidential burden in relation to this exemption (ie the burden of "adducing or pointing to evidence that suggests a reasonable possibility that the matter in question existed").

A similar approach is taken in:

- proposed new subsections 101A(4) and (5), which concern the offence of having a foreign boat equipped for fishing;
- proposed new subsections 103(1B) and (1E), which concern the offence of landing or transhipping fish from a foreign boat in Australia;
- proposed new subsections 105B(3) and (4), which concern the offence of possessing an Australian-flagged boat on the high seas equipped for fishing;
- proposed new subsections 105C(3) and (4), which concern the offence of using an Australian-flagged boat for fishing in foreign waters; and
- proposed new subsections 105F(3) and (4), which concern the offence of using an FSA boat for fishing on the high seas without the authority of a flag state.

With regard to these provisions, the Explanatory Memorandum observes either that they create new fault element offences as required by Commonwealth criminal law policy where penalties reach a substantial level, or that they implement Australia's obligations as a flag-State under the Fish Stocks Agreement. However, it is not clear why it is thought appropriate that an evidential burden be imposed on the defendant in each case (for example, it may be that the matters in issue are peculiarly within the defendant's knowledge, or the prosecution may face evidentiary difficulties in cases of offences involving foreign boats.

The Committee therefore, **seeks the Minister's advice** as to why the defendant bears an evidential burden of proof under these subsections.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Several of the new offence provisions are drafted with a 'reversal of the onus of proof'. These provisions, and why it is thought appropriate for the person believed to have committed an offence to demonstrate their innocence in each subsection, are set out below.

Section 100A and 101A: These new sections replicate the existing Section 100 and 101 offences with the introduction of fault elements and a doubling of the fine. In Sections 100(4) and 101(4) the onus is placed on the defendant, as an operator of a foreign boat fishing or equipped for fishing within the AFZ, as:

- the *Crimes Act 1914* Section 15D, 'Burden of proof of lawful authority', puts the burden on the accused to prove they were holders of an appropriate authorisation being either a foreign fishing licence, treaty licence or port permit. This onus is necessary in the operating conditions at sea where time may be limited and communications to verify the details of a foreign fishing boat may not be ideal;

- it makes explicit the common law principles that the accused would have to either point to evidence that an exception existed or that approval had been gained. In the instance of 101(5) the defendant only needs to point to evidence that the exception existed leaving the prosecution to disprove that the exception did not apply. This could entail pointing to prevailing sea conditions for a practicable straight route with secured fishing gear.

- the circumstances which led the boat being at the location within the AFZ, are matters peculiarly within the defendant's knowledge.

Section 103: This offence section regulates catch landing or transhipping in Australian ports by foreign boats. Provisions of s.103(1B)(a) make explicit the common law that the defendant would have to prove these elements and s.103(1B)(b), as a reasonable excuse provision, is a matter peculiarly within the defendant's knowledge.

Section 105B: This offence is an element of the flag State control obligations of the United Nations Fish Stocks Agreement which requires Australia to license Australian fishing boats for the high seas. The elements of s.105B(3) (a,b,c) reflect the *Crimes Act 1914* Section 15D putting the burden on the defendant to prove they were authorised through holding a fishing concession, scientific permit or documentation that the boat is on a voyage solely engaged in trade. The final element s.105B(3)(d), being a reasonable excuse provision, is a matter peculiarly within the defendant's knowledge.

Section 105C: This offence also implements the flag State responsibility obligations in the UN Fish Stocks Agreement to ensure Australian flag fishing boats do not conduct unauthorised fishing within areas under the national jurisdiction of other States. Again this onus of proof is placed on the defendant as it concerns proving he had an authorisation. Reversal of onus of proof is particularly relevant in this instance because the prosecution may face difficulties ascertaining the holding of an authorisation from a foreign country.

Section 105F: This offence implements one of the cooperative compliance measures of the UN Fish Stocks Agreement whereby enforcement action may be taken with a

foreign flag boat with the consent of the vessel's flag State which is also party to the Agreement. This provision enforces the requirement for vessels which are flagged by parties to the UN Fish Stocks Agreement to be licensed to fish within the area covered by a regional arrangement to which Australia is party. The onus of proof is placed on the defendant in that they had an authorisation as required in the *Crimes Act 1914* s.15D, particularly as the prosecution may face evidentiary difficulties securing evidence of this foreign issued licence.

I thank the Committee for raising these issues. I trust this material will be of assistance to the Committee regarding the provisions of the *Fisheries Legislation Amendment Bill (No. 1) 1999.*

The Committee thanks the Minister for this response.

Migration Legislation Amendment Act (No. 1) 1999

(Previous citation: Migration Legislation Amendment Bill (No. 2) 1998)

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 1 of 1999*, in which it made various comments. The Minister for Immigration and Multicultural Affairs responded to those comments in a letter dated 23 March 1999.

In its *Fourth Report of 1999*, the Committee made some further comments in relation to clause 2. The Minister for Immigration and Multicultural Affairs responded to those comments in a letter dated 22 June 1999.

In its *Tenth Report of 1999*, the Committee sought further advice from the Minister and the Attorney-General with regard to commencement and administration. Both the Minister for Immigration and Multicultural Affairs and the Attorney-General have responded in letters dated 20 December 1999 and 7 February 2000 respectively. Copies of the letters are attached to this report.

Although this bill has now been passed by both Houses (and received Royal Assent on 16 July 1999) the responses from the Minister and the Attorney-General may, nevertheless, be of interest to Senators. Extracts from the *Fourth* and *Tenth Reports* and relevant parts of the responses from the Minister and Attorney-General are discussed below.

Extract from Fourth Report of 1999

This bill was introduced into the Senate on 3 December 1998 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to:

- ensure that provisions of the *Human Rights and Equal Opportunity Commission Act 1986* and the *Ombudsman Act 1976* do not apply to persons who are in immigration detention, having arrived in Australia as unlawful citizens, unless such persons themselves initiate a written complaint to HREOC or orally or in writing to the Ombudsman; and

- clarify the duties of the Minister and officials concerning advice relating to applications for visas and on access to legal and other advice.

Introduction

In general terms, this bill is similar in form to the Migration Legislation Amendment Bill (No 2) 1996 ("the 1996 bill"), which was introduced into the Senate on 20 June 1996, and on which the Committee reported in its *Sixth Report of 1996*.

Retrospective effect and the current bill
Clause 2

Clause 2 of the 1998 bill provides that the proposed amendments are to commence on the date the bill was introduced into the Senate (ie 3 December 1998). In commenting on this provision, the Committee notes that, for more than 2 years between 1996 and 1998, the law was apparently administered on the basis of legislation which was said to operate retrospectively and yet was never passed by the Parliament. It is conceivable that such a situation might again arise in the case of the present bill.

It is also conceivable that the bill may ultimately be passed in an amended form. Again, this may have implications for the way the law will be administered in the period between the introduction of the bill, and its final passage through the Parliament.

The Committee reiterates that it is opposed in principle to retrospective legislation which detrimentally affects rights. The Committee considers that, in principle, legislation which changes the nature of people's access to justice should commence from the date it is passed by the Parliament rather than the date it is introduced into the Parliament. Given the experience of the 1996 bill, the Committee **seeks the Minister's advice** on the reasons for making this bill operative from its introduction rather than its passage, and on the implications of this for Departmental officers and administration should the bill again not be passed, or be passed in an amended form.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from earlier response from the Minister dated 23 March 1999

> The Committee has noted that the Bill commences on the date of its introduction into Parliament, rather than its passage. The Committee believes that this may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

This Bill is largely the same as the Migration Legislation Amendment Bill (No. 2) 1996, which was before the last Parliament. That Bill was introduced on 20 June 1996 and had a commencement date linked to my public announcement on the issue on 19 June 1996.

The present Bill has a commencement date of 3 December 1998, being the date of the Bill's re-introduction into the Senate. This date was chosen to take into account the two-year delay associated with the previous Bill and because there had been no events between 20 June 1996 and 3 December 1998 that could have required retrospective validation.

I assure the Committee that making the Bill operative from the date of introduction rather than its passage does not have implications for Departmental officers or administration as both the Human Rights Commissioner and the Commonwealth Ombudsman have given undertakings that they will carry out the functions under their respective legislation as if the Bill has been passed.

I trust that these comments will be of assistance to the Committee.

The Committee thanks the Minister for this response, and accepts his assurance that "there were no events between 20 June 1996 and 3 December 1998 that could have required retrospective validation". The Committee also notes the Minister's assurance that making the bill operative from the date of its introduction rather than its passage has no implications for Departmental officers or administration "as both the Human Rights Commissioner and the Commonwealth Ombudsman have given undertakings that they will carry out the functions under their respective legislation as if the Bill has been passed". However, the Committee continues to be concerned at the potential implications of the bill's approach to its commencement.

For example, the Committee notes recent media reports that 95 illegal immigrants had entered Australia or been found in Australian waters at Cairns, Gove, Christmas Island and off the coast of Darwin in February and March of this year. The Committee **would appreciate the Minister's further advice** as to whether this bill is currently being applied to these people, and to the functions of the Human Rights Commissioner and the Commonwealth Ombudsman under their respective legislation in relation to these people.

Pending the Minister's advice, the Committee continues to draw Senators' attention to this provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from further response from the Minister dated 22 June 1999

> The Committee has sought further advice as to whether this Bill is currently being applied to the recent unauthorised boat arrivals, and to the functions of the Human Rights Commissioner and the Commonwealth Ombudsman under their respective legislation in relation to these people, and it's retrospective nature.
>
> This Bill provides for a retrospective commencement date of the Bill's re-introduction into the parliament. It is retrospective to ensure that if a set of circumstances similar to the Teal incident occurred between the date of introduction and the Bill's passage, that it would be covered by the provisions of the Bill.
>
> As of the day of writing no such situation has occurred. If a situation were to arise between introduction and commencement of the Bill, the Human Rights Commissioner has given an undertaking that HREOC will act consistent with the protocol detailed in my letter of 12 March 1999. This means that HREOC would act as if the Bill has been passed. The subsequent commencement of the Bill would sanction such interim use of the protocol. These undertakings, of course, continue to apply to recent boat arrivals.
>
> Failure to proceed with the legislation will mean that inconsistencies in Commonwealth law highlighted in the 1996 Teal case will continue and that tensions arising from departure from the agreement may not be readily resolved.
>
> I trust these comments will be of assistance to the Committee.

The Committee thanks the Minister for this further response and acknowledges that, to date, no circumstances similar to the 'Teal' case have re-occurred.

However, the Committee remains concerned by the approach to commencement and administration taken in the bill. In essence, a bill has been introduced and its provisions are being applied even though it has not been passed, was not passed during the previous Parliament, and, indeed, may never be passed. Such an approach permits legislation to be introduced and enforced without Parliament ever being required to finally vote on the matter.

Given this, the Committee would appreciate **the Minister's further advice** and **the advice of the Attorney-General** on the following matters:

- under what authority can a Department or statutory body such as the Human Rights and Equal Opportunity Commission exempt itself from administering the provisions of the law in a manner determined by the Parliament and the courts; and
- what is the legal effect of actions taken in administering a law which is declared to be retrospective but which is not passed by the Parliament.

Relevant extract from the further response from the Minister dated 20 December 1999

I refer to the letter of 24 June 1999 from the Secretary to the Committee referring to my further response to the Committee (22 June 1999). I regret the delay in replying, which resulted from a misunderstanding within my department due to the passage of the Bill.

The Committee has sought further advice from me, and the Attorney-General's Office, regarding the authority a Department or statutory body, such as the Human Rights and Equal Opportunity Commission (HREOC), has in exempting itself from administering the provisions of the law in a manner determined by the Parliament and the courts, and the legal effect of actions taken in administering a law which is declared to be retrospective but which is not passed by the Parliament.

It is my understanding that a Department or statutory body such as HREOC does not have authority to exempt itself from administering the provisions of the law as it has been determined by the Parliament and the courts. However, there may be circumstances where a body may be able to take action, consistently with its current statutory responsibilities, which nevertheless has regard to the impending retrospective change to the law.

In relation to your specific reference to HREOC, I believe that under the HREOC Act, the Commission is given certain powers to assist it in carrying out its functions. However, whether the Commission uses a particular power in any investigation is a matter of discretion for the Commission, who is not under any obligation to use all or any of its powers when inquiring into any matter before it.

Furthermore, I do not believe that action by the Commission or the Ombudsman to discontinue the practice of sending information to people in immigration detention in circumstances where there had been no previous complaint was unlawful, given the terms of the HREOC Act and the Ombudsman Act as they existed at the time the undertaking was given. In particular, neither the Commission nor the Ombudsman had a duty, as opposed to a power, to send information to non-citizens in immigration detention in such circumstances.

I am informed that since the Human Rights Commissioner provided his undertaking, no occasion for use of the particular power in question has arisen.

I trust these comments are of assistance.

The Committee thanks the Minister for this further response.

Relevant extract from the response from the Attorney-General dated 7 February 2000

I note the Committee's comments on page 260 of the Tenth Report of 1999, in particular, that the Committee would appreciate the Attorney-General's advice on the following matters in relation to this Bill:

- under what authority can a Department or statutory body such as the Human Rights and Equal Opportunity Commission exempt itself from administering the provisions of the law in a manner determined by the Parliament and the courts; and

- what is the legal effect of actions taken in administering a law which is declared to be retrospective but which is not passed by the Parliament.

I understand that the Migration Legislation Amendment Bill (No. 2) 1998 was passed by Parliament on 30 June 1999 and received Royal Assent on 16 July 1999. This being the case, the situation to which the Committee has referred does not arise, and for this reason, it appears that little purpose would be served in the Attorney providing the Committee with the advice sought.

Thank you for drawing the Attorney's attention to this matter.

The Committee notes the Attorney-General's response.

Barney Cooney
Chairman

RECEIVED
14 FEB 2000
Senate Standing C'ttee
for the Scrutiny of Bills

HON WARREN TRUSS MP

Minister for Agriculture, Fisheries and Forestry

Senator the Hon Barney Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to the letter of 23 September 1999 from Mr James Warmenhoven, Secretary to the Committee, to my Senior Adviser referring to the comments contained in the Scrutiny of Bills Alert Digest No.14 of 1999 concerning the *Fisheries Legislation Amendment Bill No.1 1999*. I understand that, though the Bill was passed on 14 October 1999, my response is still sought and may be included in the Committee's report in the next sitting week.

As indicated in the Alert Digest the Bill has two schedules – the first dealing with more effective foreign fishing enforcement, within the Australian fishing zone (AFZ), and the second enabling Australia to ratify the *Agreement for the Implementation of the Provisions of the United Nations Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*. Though this Agreement impacts management of fisheries within the AFZ, it largely concerns regulation of high seas fishing.

Enforcement of fisheries offences requires the use of both strict liability and reversal of onus of proof offences. The Government is committed to effective deterrents being in place for illegal foreign fishing in the AFZ. Most recently, this was confirmed by acceptance of the recommendations in the Report of the Prime Minister's Coastal Surveillance Task Force that comprehensive legislative amendments should be introduced to further strengthen maritime investigatory and enforcement powers.

Many of the offence provisions in the Fisheries legislation are strict liability offences. This type of legislation is necessary because of:

- the difficult practical circumstances with enforcement including collection of proof offshore; and
- the need for strong measures to protect fish resources and the marine environment.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7520 Facsimile: (02) 6273 4120

The explicit references to strict liability offences under Schedule 1 of the Bill confirm that the existing relevant provisions under the *Fisheries Management Act 1991* (ie subsections 95(2) and (5); section 99; section 100; and section 101) should continue to be considered as strict liability. This confirmation that these offences are strict liability is consistent with the impending *Criminal Code*.

Several of the new offence provisions are drafted with a 'reversal of the onus of proof'. These provisions, and why it is thought appropriate for the person believed to have committed an offence to demonstrate their innocence in each subsection, are set out below.

Section 100A and 101A: These new sections replicate the existing Section 100 and 101 offences with the introduction of fault elements and a doubling of the fine. In Sections 100(4) and 101(4) the onus is placed on the defendant, as an operator of a foreign boat fishing or equipped for fishing within the AFZ, as:

- the *Crimes Act 1914* Section 15D, 'Burden of proof of lawful authority', puts the burden on the accused to prove they were holders of an appropriate authorisation being either a foreign fishing licence, treaty licence or port permit. This onus is necessary in the operating conditions at sea where time may be limited and communications to verify the details of a foreign fishing boat may not be ideal;
- it makes explicit the common law principles that the accused would have to either point to evidence that an exception existed or that approval had been gained. In the instance of 101(5) the defendant only needs to point to evidence that the exception existed leaving the prosecution to disprove that the exception did not apply. This could entail pointing to prevailing sea conditions for a practicable straight route with secured fishing gear.
- the circumstances which led the boat being at the location within the AFZ, are matters peculiarly within the defendant's knowledge.

Section 103: This offence section regulates catch landing or transhipping in Australian ports by foreign boats. Provisions of s.103(1B)(a) make explicit the common law that the defendant would have to prove these elements and s.103(1B)(b), as a reasonable excuse provision, is a matter peculiarly within the defendant's knowledge.

Section 105B: This offence is an element of the flag State control obligations of the United Nations Fish Stocks Agreement which requires Australia to license Australian fishing boats for the high seas. The elements of s.105B(3) (a,b,c) reflect the *Crimes Act 1914* Section 15D putting the burden on the defendant to prove they were authorised through holding a fishing concession, scientific permit or documentation that the boat is on a voyage solely engaged in trade. The final element s.105B(3)(d), being a reasonable excuse provision, is a matter peculiarly within the defendant's knowledge.

Section 105C: This offence also implements the flag State responsibility obligations in the UN Fish Stocks Agreement to ensure Australian flag fishing boats do not conduct unauthorised fishing within areas under the national jurisdiction of other States. Again this onus of proof is placed on the defendant as it concerns proving he had an authorisation. Reversal of onus of proof is particularly relevant in this instance because the prosecution may face difficulties ascertaining the holding of an authorisation from a foreign country.

Section 105F: This offence implements one of the cooperative compliance measures of the UN Fish Stocks Agreement whereby enforcement action may be taken with a foreign flag boat with the consent of the vessel's flag State which is also party to the Agreement. This provision enforces the requirement for vessels which are flagged by parties to the UN Fish Stocks Agreement to be licensed to fish within the area covered by a regional arrangement to which Australia is party. The onus of proof is placed on the defendant in that they had an authorisation as required in the *Crimes Act 1914* s.15D, particularly as the prosecution may face evidentiary difficulties securing evidence of this foreign issued licence.

I thank the Committee for raising these issues. I trust this material will be of assistance to the Committee regarding the provisions of the *Fisheries Legislation Amendment Bill (No.1) 1999.*

Yours sincerely

WARREN TRUSS

09 FEB 2000

The Hon. Philip Ruddock MP
Minister for Immigration and Multicultural Affairs
Minister Assisting the Prime Minister for Reconciliation

Parliament House, Canberra ACT 2600
Telephone: (02) 6277 7860
Facsimile: (02) 6273 4144

Senator B Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
Canberra ACT 2600

20 DEC 1999

Dear Senator Cooney

I refer to the letter of 24 June 1999 from Mr James Warmenhoven, Secretary to the Committee, to my Senior Adviser referring to my further response to the Committee (22 June 1999) concerning the Migration Legislation Amendment (No 1) Bill 1999 (the Bill). I regret the delay in replying, which resulted from a misunderstanding within my department due to the passage of the Bill.

The Committee has sought further advice from me, and the Attorney-General's Office, regarding the authority a Department or statutory body, such as the Human Rights and Equal Opportunity Commission (HREOC), has in exempting itself from administering the provisions of the law in a manner determined by the Parliament and the courts, and the legal effect of actions taken in administering a law which is declared to be retrospective but which is not passed by the Parliament.

It is my understanding that a Department or statutory body such as HREOC does not have authority to exempt itself from administering the provisions of the law as it has been determined by the Parliament and the courts. However, there may be circumstances where a body may be able to take action, consistently with its current statutory responsibilities, which nevertheless has regard to the impending retrospective change to the law.

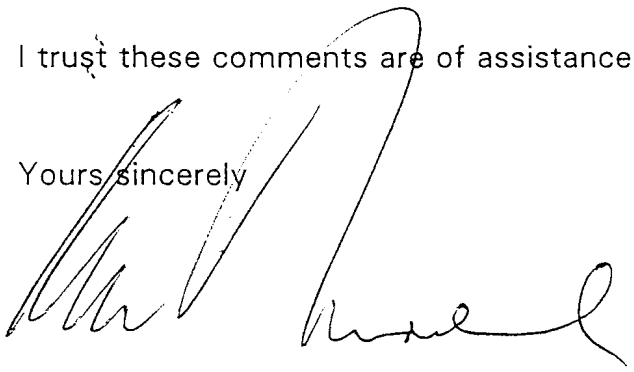
In relation to your specific reference to HREOC, I believe that under the HREOC Act, the Commission is given certain powers to assist it in carrying out its functions. However, whether the Commission uses a particular power in any investigation is a matter of discretion for the Commission, who is not under any obligation to use all or any of its powers when inquiring into any matter before it.

Furthermore, I do not believe that action by the Commission or the Ombudsman to discontinue the practice of sending information to people in immigration detention in circumstances where there had been no previous complaint was unlawful, given the terms of the HREOC Act and the Ombudsman Act as they existed at the time the undertaking was given. In particular, neither the Commission nor the Ombudsman had a duty, as opposed to a power, to send information to non-citizens in immigration detention in such circumstances.

I am informed that since the Human Rights Commissioner provided his undertaking, no occasion for use of the particular power in question has arisen.

I trust these comments are of assistance.

Yours sincerely



Philip Ruddock

The Hon Daryl Williams AM QC MP

Attorney-General

995394/M192035

7 FEB 2000

Mr James Warmenhoven
Secretary
Senate Standing Committee for the
Scutiny of Bills
Parliament House
Canberra ACT 2600

Dear Mr Warmenhoven

Thank you for your letter of 24 June enclosing a copy of the Committee's Tenth Report of 1999, which included a report on the Migration Legislation Amendment Bill (No. 2) 1998.

I note the Committee's comments on page 260 of that Report, in particular, that the Committee would appreciate my advice on the following matters in relation to this Bill:

- under what authority can a Department or statutory body such as the Human Rights and Equal Opportunity Commission exempt itself from administering the provisions of the law in a manner determined by the Parliament and the courts; and

- what is the legal effect of actions taken in administering a law which is declared to be retrospective but which is not passed by the Parliament.

I understand that the Migration Legislation Amendment Bill (No. 2) 1998 was passed by Parliament on 30 June 1999 and received Royal Assent on 16 July 1999. This being the case, the situation to which the Committee has referred does not arise, and for this reason, it appears that little purpose would be served in my providing the Committee with the advice sought.

Thank you for drawing my attention to this matter.

Yours sincerely

Daryl Williams

DARYL WILLIAMS

Parliament House, Canberra ACT 2600 • Telephone (02) 6277 7300 • Fax (02) 6273 4102